PP

v.

FOO KIM LAI

HIGH COURT MALAYA, KUALA LUMPUR
SURAYA OTHMAN J
[CRIMINAL APPEAL NO: 41-94-2006]
28 AUGUST 2008

***CRIMINAL PROCEDURE**: Prosecution - Prima facie case - Theft - Elements of charge - Whether satisfied - Essential ingredients of s. 379A and s. 411 of the Penal Code - Whether proved - Possession and knowledge of alleged stolen vehicle - Whether there was evidence of possession to raise the presumption under s. 114(a) Evidence Act 1950 - Whether prima facie case of theft established - Criminal Procedure Code, s. 314*

***CRIMINAL PROCEDURE**: Prima facie case - Establishment of - Theft - Elements of charge - Whether satisfied - Essential ingredients of s. 379A and s. 411 of the Penal Code - Whether proved - Possession and knowledge of alleged stolen vehicle - Whether proved - Whether there was evidence of possession to raise the presumption under s. 114(a) Evidence Act 1950 - Whether magistrate court erred in acquitting and discharging respondent - Criminal Procedure Code, s. 314*

The respondent was charged in the magistrate's court under s. 379(A) for theft of a Proton Putra and alternatively under s.411 of the Penal Code, for dishonestly receiving stolen property knowing it to be stolen. The respondent pleaded not guilty and at the close of the prosecution's case, the learned magistrate held that the prosecution had failed to establish a *prima facie* case and accordingly acquitted and discharged the respondent without calling for his defence for both the charges. Dissatisfied with the said decision, the public prosecutor appealed to the High Court. The complainant herein (PW1) had lodged a police report for the loss of his car on 2 May 2001. According to the raiding officer's evidence (PW2), upon information given by one Wong Chee Kong who was arrested in another operation, he had arrested the respondent. The said Wong Chee Kong had led PW2 to the respondent. Upon arrival at the respondent's premises, PW2 discovered that the respondent was in the midst of repairing his own vehicle. There was another vehicle parked behind the respondent's vehicle of which the respondent denied ownership of.

A search was made on the respondent whereby the police found two keys in the respondent's pocket, one of which could be used to start the vehicle, a Proton Putra ('the said vehicle'). Upon examination of the said vehicle, it was discovered that the said vehicle was reported to be stolen *via* Cheras Report No. 3988/01. Hence, the respondent was charged. The issues that arose in this appeal were (a) since the respondent could not be located, whether the court could proceed with the appeal pursuant to s. 314 of the Criminal Procedure Code; (b) whether the elements of the charge were satisfied by the prosecution (c) whether the essential ingredients of s. 379A and s. 411 of the Penal Code were proven; (d) whether there was evidence of possession to raise the presumption under s. 114(a) of the Evidence Act 1950.

Held (dismissing the appeal by prosecution; affirming decision of the lower court):

(1) Section 314 of the CPC provides options to the court which exercises its appellate jurisdiction, one of which is in the event the service of the said notice of appeal still cannot be effected on the respondent, the court shall then proceed to hear the appeal in the absence of the respondent. In this case, the court agreed with what was decided in *Public Prosecutor v. Chan Quee Long* that the appeal should be proceeded with, for to postpone it further to a later date will only result in a further backlog of cases for this court to dispose of. (paras 19 & 20)

(2) The prosecution had failed to satisfy the essential ingredients of s. 379A of the Penal Code. Other than proving that the property was a motor vehicle *ie,* a car, the prosecution had failed to prove the remainder ingredients. There was no evidence indicating or witnesses that implicated the respondent stole the vehicle at the time and place as stipulated in the charge, and this included PW1, the complainant who had no idea who stole his vehicle. Also, based on the evidence, at the time of arrest, the respondent was not driving the said vehicle. It was highly insecure to call upon the respondent to enter his defence to the charge under s. 379A of the Penal Code as the prosecution had failed to establish a *prima facie* case and the learned Magistrate's decision in acquitting and discharging the respondent without calling for his defence was proper and correct in the circumstances. (paras 30 & 31)

(3) It was doubtful as to whether the said vehicle which was identified by PW1 as his vehicle was the same one which was reported to be stolen by him. This was because the arrest report of the respondent and the seizure of the said vehicle was in connection with the theft reported *via* Cheras Report No 3988/2001, which was totally different from the report lodged by PW1 *ie*, Petaling report No 3956/2001. No explanation was given by the prosecution with regard to this issue. Further, the failure of the prosecution to call Wong Chee Kong, who had close connection to the arrest of the respondent and the seizure of the said vehicle, was fatal to the prosecution's case since to accept the conflicting evidence without calling that witness to explain or be cross examined would cause miscarriage of justice to the respondent. The investigation carried out by the investigation officer, PW4, was minimal and incomplete. It totally failed to assist this court in making finding of facts as to whether the respondent had any knowledge that the said vehicle was stolen property and that he had received or retained the stolen property dishonestly. Due to this poor investigation, it had raised a lot of gaps in the prosecution's case. It was the prosecution's duty and responsibility to fill up the gaps. (paras 37, 40, 41 & 49)

(4) The prosecution had failed to prove that the respondent had knowledge that the said vehicle was a stolen property. By merely finding the way to the said vehicle in the respondent's possession and the said vehicle was parked in the respondent's premises were insufficient to prove that the respondent had knowledge that the vehicle was a stolen vehicle. Further, the discovery of the said vehicle was not soon after the theft. The said vehicle was only discovered after five days from the date it was reported to be stolen. The period of five days was rather a long period for the prosecution to invoke the presumption under s. 114(a) of the Evidence Act 1950 as anything could happen to the said vehicle within the five day period. The fact that the respondent claimed that he had purchased the vehicle from one 'Ah Wah' was never investigated, when this could have been done to ascertain the truth of the respondent's claim. The presumption under s. 114(a) of the Evidence Act 1950 could not be relied on by the prosecution. (paras 51, 57 & 59)

A **(5)** The decision made by the learned magistrate to acquit and discharge the respondent on both the charges without calling for his defence was not wrong as he had taken all relevant factors and weaknesses of the prosecution case before coming to his decision. (para 60)

B

Case(s) referred to:
Abdul Manap v. PP [1966] 1 LNS 3 ***(refd)***
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
C *Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
PP v. Chan Quee Long [1993] 4 CLJ 262 HC ***(refd)***
PP v. Goh Thor Kiah [1952] 1 LNS 85 ***(refd)***
PP v. Hong Ah Huat [1970] 1 LNS 113 ***(refd)***
D *PP v. Kasmin Soeb [1974] 1 LNS 116* ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
E Criminal Procedure Code, ss. 308, 310, 314(2)
Evidence Act 1950, s. 114(a)
Penal Code, ss. 379A, 411

For the prosecution/appellant - Shamsul Sulaiman DPP

F *Reported by Suhainah Wahiduddin*

JUDGMENT

G **Suraya Othman J:**

[1] The respondent was charged in the Magistrate's Court in Kuala Lumpur under s. 379(A) for theft of a Proton Putra and alternatively under s. 411 of the Penal Code, for dishonestly
H receiving stolen property knowing it to be stolen. The charges were as follows:

[2] Main Charge

Bahawa kamu pada 2.5.2001 antara jam 0100 pagi hingga 0700
I pagi bertempat di tepi jalan hadapan rumah No. 79, Jalan Hujan Gerimis 1, O.U.G. Kuala Lumpur di dalam daerah Brickfields, di dalam Negeri Wilayah Persekutuan Kuala Lumpur, telah mencuri sebuah kereta jenis Proton Putra 1.8, warna Kelabu, Nombor

Pendaftaran WHC 8162, Chasis No. PLIC99DRRXB005728, Enjin No. 4G93P-GC9801 bernilai RM52,000.00 kepunyaan Tang Chee Fung (P) KP: 721127-06-5072. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 379A Kanun Keseksaan.

[3] Alternative Charge

Bahawa kamu pada 7.5.2001 jam lebih kurang 4.00 pagi bertempat di No. 6772, Jalan Bendahara off Jalan Cochrane Kuala Lumpur di dalam daerah Cheras, di dalam Negeri Wilayah Persekutuan Kuala Lumpur, didapati dengan curangnya memiliki harta curi sebuah kereta jenis Proton Putra 1.8, warna Kelabu, Nombor Pendaftaran WHC 8162, Chasis No. PLIC99DRRXB005728, Enjin No. 4G93P-GC9 kepunyaan Tang Chee Fung (P) KP: 721127-06-5072 yang mana kamu tahu atau ada sebab-sebab mempercayai bahawa barang tersebut adalah barang curi. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 411 Kanun Keseksaan.

[4] The respondent pleaded not guilty to both the charges and claimed trial, whereby six (6) prosecution's witnesses were called to give evidence in the prosecution's case. At the close of the prosecution's case, the learned Magistrate held that the prosecution had failed to establish a *prima facie* case and, accordingly, acquitted and discharged the respondent without calling for his defence for both the charges. Being dissatisfied with the decision of the learned Magistrate, the Public Prosecutor appealed to the High Court.

The Facts Of The Case

[5] The complainant in this case (PW1) lodged a police report for the lost of his car, a Proton Putra between 1am till 7am on 2 May 2001. During his testimony in the Magistrate's Court, PW1 agreed that he has no knowledge as to how the incident occurred and who had stolen his vehicle.

[6] According to the raiding officer's evidence (PW2), upon information given by one Wong Chee Kong who was arrested in another operation, he arrested the respondent. The said Wong Chee Kong led PW2 and his team to the respondent. Upon arrival at the respondent's premises, PW2 discovered that the respondent was in the midst of repairing his own vehicle. There was another vehicle parked behind the respondent's vehicle of which the

respondent denied ownership of.

[7] A search was made on the respondent whereby the police found two keys in the respondent's pocket and one (1) of which can be used to start the vehicle, a Proton Putra ("the said vehicle') which was parked behind respondent's vehicle.

[8] Upon examination of the said vehicle, it was discovered that the said vehicle was reported to be stolen *via* Cheras Report No. 3988/01. Hence, the respondent was arrested for further investigation.

[9] PW1 identified the said vehicle to be his Proton Putra of which was reported to be stolen. Based on the above discovery, the respondent was charged in the Magistrate's Court, Kuala Lumpur under s. 379A and alternatively under s. 411 of the Penal Code.

[10] One important factor in this case is that there is no ground of judgment prepared or provided by the learned Magistrate as the learned Magistrate has left the judiciary. Hence in this appeal, I merely relied on the notes of evidence noted down by the learned Magistrate at the time of the trial.

[11] Based on the above scenario whereby no grounds of judgment was provided, the petition of appeal ought not to be filed. It is clearly provided by s. 308 of the Criminal Procedure Code (FMS Cap. 6) ("CPC").

[12] The learned Deputy Public Prosecutor ("DPP") during the proceeding of this appeal admitted that there was a mistake made on the appellant's part in filing the petition of appeal eventhough no grounds of judgment was provided.

[13] Hence, I am doubtful as to the usefulness of the grounds of appeal as stated in the petition of appeal as the reasons for appeal can only be justified upon examination of the grounds of judgment, if so provided, and in this instant case there was none.

[14] Nevertheless, pursuant to s. 310 of the CPC, in order to ensure that substantial justice may be done to the parties involved, I decided to proceed with the appeal without the grounds of judgment and the learned DPP has no objection to it.

[15] The appeal proceeded in the absence of the respondent as the court registrar was unable to serve the notice of appeal on the respondent despite numerous attempts being made. Based on the examination of the record of proceeding, there were several adjournments by this court on the ground of failure to serve the notice of appeal on the respondent. This appeal was fixed on 18 May 2007, 6 July 2007, 11 September 2007, 30 October 2007, 28 January 2008, 1 April 2008 and lastly on 24 June 2008.

[16] On 24 June 2008, the learned DPP informed the court that they could not locate the respondent. The address elicited from a search in the National Registration Department was found to be non existent. Hence, the learned DPP left it to the discretion of this court whether to continue to proceed with the appeal pursuant to s. 314 of the CPC.

[17] Section 314 of the CPC clearly provides as follows:

> (1) If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service through the Registrar.
>
> (2) If the service of the last-mentioned notice cannot be effected on the respondent, the Court shall proceed to hear the appeal in his absence.

[18] Section 314 of the CPC clearly provides two options to the court which exercises its appellate jurisdiction.

[19] First, in the event the respondent is not present and the court is satisfied that the notice of appeal was duly served on the respondent, the court shall not make any order adverse to or to the prejudice of the respondent and instead will adjourn the hearing of the appeal to a future date. The court registrar will then issue a new notice informing the respondent to be present on the new hearing date.

[20] Second, in the event the service of the said notice of appeal still cannot be effected on the respondent, the court shall then proceed to hear the appeal in the absence of the respondent.

[21] Taylor J in *Public Prosecutor v. Goh Thor Kiah* [1952] 1 LNS 85 in considering s. 314(2) of the CPC was of the view that the said section was an exercise in futility. He said that:

> ... the incongruity of sentencing a man without his having had the opportunity to be heard was worthless as there would not be a fair prospect of the sentence being enforced ...

His Lordship further stated that:

> ... (this) construction is surprising in that it involves the provision that a person who has been acquitted in one of the lower Courts might have his acquittal reversed and a conviction substituted and the sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alteram partem* in my view, is wholly opposed to all our principles of judicial procedure.

[22] In the above circumstances, the learned judge refused to hear the appeal, did not dismiss it but ordered it to be adjourned to another date.

[23] However Abdul Malik Ishak (JC) (as he then was) in the case of *Public Prosecutor v. Chan Quee Long* [1993] 4 CLJ 262 decided to continue hearing the appeal under s. 314(2) after giving due consideration to the judgment in the above mentioned case. His Lordship has this to say:

> ... In the instant appeal, I proceeded to hear the appeal in the absence of the respondent holding steadfast to the limitation that 'the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the (absent) respondent.'

[24] I agree with His Lordship Abdul Malik Ishak J that the appeal should be proceeded with in the absence of the respondent, for to postpone it further to a later date will only result in a further backlog of cases for this court to dispose of.

[25] Having said that, I shall now proceed with the merit of the appeal. As stated earlier, this appeal is merely based on the examination of the notes of evidence as taken down by the learned Magistrate at the time of the trial.

[26] The Court of Appeal in *Public Prosecutor v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 has laid down a guide for trial courts to adopt when considering whether the prosecution had made out their cases. Gopal Sri Ram JCA held:

> For the guidance of the courts below, we summaries as follows the steps that should be taken by a trial court at the close of the prosecution case:
>
> (i) The close of the prosecutor's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution witness. Take into account all reasonable inferences that may be drawn from that evidences. If the evidence admits of two or more inferences, then draw the inference that is more favourable to the accused;
>
> (ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is "yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then a *prima facie* case has not been made out and the accused should be acquitted.

[27] The above principle was discussed and affirmed in the case of *Looi Kow Chai & Anor v. Public Prosecutor* [2003] 1 CLJ 734 and *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85.

[28] Based on the above said legal principle, it is the duty of this court to determine whether the prosecution has established a *prima facie* case against the respondent for any of the two said charges.

[29] For the first charge ie, theft of a motor vehicle under s. 379A of the Penal Code, the primary issue to be determined is whether the elements of the charge were satisfied by the prosecution. The essential ingredients of s. 379A are as follows:

(i) The property in question was a motor vehicle or a component part thereof;

(ii) The accused took such property out of the possession of another person;

(iii) The taking was without the consent of the person in possession;

(iv) There was some movement of the said property so as to constitute taking;

(v) The accused took such property with the intent to cause:

(c) wrongful loss to the person who has possession of the property; or

(d) wrongful gain to himself.

[30] Based on the examination of the notes of evidence, I am satisfied that the prosecution has failed to satisfy the essential ingredients of s. 379A of the Penal Code. Other than proving that the property is a motor vehicle ie, a car (vehicle), the prosecution has failed to prove the remainder ingredients. There was no evidence indicating or witnesses that implicated the respondent stole the vehicle at the time and place as stipulated in the charge, and this include PW1, the complainant who had no idea who stole his vehicle.

[31] The Investigation Officer (PW4) himself in his investigation was unable to answer to this fact as to whether the said vehicle was stolen by the respondent. Also based on the evidence, it is clearly stated that at the time of arrest, the respondent was not driving the said vehicle. The only evidence against the respondent was that the key to the ignition of the said vehicle was found in the respondent's pocket and the said vehicle was within the respondent's premises. As such based on the above facts, it is highly insecure to call upon the respondent to enter his defence to the charge under s. 379A of the Penal Code as the prosecution has failed to establish a *prima facie* case and the learned Magistrate's decision in acquitting and discharging the respondent without calling for his defence is proper and correct in the circumstances.

[32] Now, on the alternative charge of dishonestly receiving stolen property under s. 411, the essential ingredients to be proven by the prosecution are as follows:

(i) The property in question was stolen property;

(ii) The accused received or retained such stolen property;

(iii) The accused did so dishonestly knowing or having reason to believe that it was stolen property.

[33] As stated earlier, at the time of arrest, the said vehicle was not driven by the respondent. Merely the key to the ignition of the said vehicle was found in the respondent's pocket and the said vehicle was within the respondent's premises.

[34] The primary question here is whether from the facts as stated above, the prosecution has established a *prima facie* case against the respondent under s. 411 of the Penal Code which warrants the respondent to be called to enter his defence.

[35] The answer to the above is depended on the supportive evidence tendered by the prosecution.

[36] In his evidence in court, PW1 identified the said vehicle to be his vehicle which was stolen. According to him there was no apparent changes made to the said vehicle except for the tyres and radio.

[37] However, I was doubtful as to whether the said vehicle which was identified by PW1 as his vehicle is the same one which was reported to be stolen by him. This is because the arrest report of the respondent and the seizure of the said vehicle is in connection with the theft reported *via* Cheras Report No.3988/2001. It is totally different from the report lodged by PW1 ie, Petaling Report No. 3956/2001.

[38] This discrepancy is a material fact for the court to consider. No explanation was given by the prosecution with regard to this issue and the Investigation Officer, PW4 himself had no knowledge about Cheras Report No. 3988/2001 and presumed that it is of no importance.

[39] It is crucial for the court to understand the reason behind the discrepancy of police reports. In the event the arrest and seizure by the police is in connection to the theft lodged by PW1, then it should be in connection with Petaling Report 3956/2001 and not Cheras Report No. 3988/2001.

[40] Further, the respondent was arrested upon information by one named Wong Chee Kong. The said Wong Chee Kong was arrested in connection with other cases totally different from that of the respondent. Based on the information given by Wong Chee Kong, the police went to the respondent's premises and discovered the said vehicle.

[41] Since Wong Chee Kong has close connection to the arrest of the respondent and seizure of the said vehicle, it is my opinion that he ought to be called to give evidence and be cross examined on the matter. Further, the Arresting Officer, PW2 during cross examination also agreed that the presence of Wong Chee Kong is crucial to explain the whole scenario.

[42] With regard to this issue, I agree with the principle stated in the case of *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1. It was held in that case that:

> While the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt. At the very least, the prosecutor should make them available for cross-examination by the defence. If the prosecution failed to fulfill this duty, the accused must be acquitted.

[43] Hence, it is my view that the failure of the prosecution to call Wong Chee Kong was fatal to the prosecution's case since to accept the conflicting evidence without calling that witness to explain or be cross examined would cause miscarriage of justice to the respondent.

[44] Further, it is my opinion that the investigation carried out by the Investigation Officer, PW4 was minimal and incomplete. It totally failed to assist this court in making finding of facts as to whether the respondent has any knowledge that the said vehicle was stolen property and that he received or retained the stolen property dishonestly.

[45] PW4 also failed to carry out further investigation or to take any statement from Wong Chee Kong. During testimony in court, PW4 stated that Wong Chee Kong's statement was not crucial as such no further investigation was made.

[46] Why is this so? How can an investigation officer state that Wong Chee Kong's statement is not crucial when the respondent was arrested and the said vehicle was seized based on his information?

[47] Further, through PW4's investigation, the respondent had indeed informed him that the said vehicle was purchased from someone by the name of "Ah Wah". However, no further investigation was carried out by PW4 with regard to this.

[48] PW4 also gave uncertain answers when it was suggested by defence counsel that the respondent totally had no knowledge that the said vehicle was a stolen vehicle.

[49] As such, it is my opinion that due to this poor investigation, it has raised a lot of gaps in the prosecution's case. It is the prosecution's duty and responsibility to fill up the gaps. (See *Mohan Singh Lachman Singh v. Public Prosecutor* [2002] 3 CLJ 293, *Abdullah Zawawi Omar v. Public Prosecutor* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 and *PP v. Saimin & Ors.* [1971] 1 LNS 115).

[50] It was decided in the case of *Mohan Singh Lachman Singh v. PP* that:

> (4) The burden of proving its case at every state lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific question relevant to its case. Such gaps must be filled by the prosecution itself.

[51] Based on the abovementioned case, it is my opinion that the prosecution has failed to prove that the respondent had knowledge that the said vehicle was a stolen property. By merely finding the key to the said vehicle in the respondent's possession and the said vehicle parked in the respondent's premises are insufficient to prove that the respondent has knowledge that the vehicle is a stolen vehicle.

[52] Further, I wish to touch on whether the prosecution may rely on s. 114(a) of the Evidence Act 1950. Section 114(a) of the Evidence Act 1950 provides that:

> The court may presume:
>
> (a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

[53] Reference was made to the case of *Public Prosecutor v. Hong Ah Huat* [1970] 1 LNS 113. Based on the principle stated in that case, the following three (3) elements must exist before the presumption under s. 114(a) of the Evidence Act 1950 can be invoke. They are:

(i) The said vehicle is a stolen property;

(ii) It in the respondent's possession;

(iii) In the possession soon after the theft.

(*Abdul Manap v. Public Prosecutor* [1966] 1 LNS 3 also referred)

[54] It is my opinion that none of the abovementioned elements were successfully proven by the prosecution in order for the prosecution to invoke the presumption under s. 114(a) of the Evidence Act 1950.

[55] First, the discrepancy of the reference of the police report as stated earlier had raised doubt as to whether the said vehicle was a stolen property.

[56] Second, the prosecution also failed to prove that the said vehicle was actually in the possession of the respondent. As stated in *Public Prosecutor v. Hong Ah Huat*:

> ... possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

[57] Third, the discovery of the said vehicle was not soon after the theft. The said vehicle was only discovered after five days from the date it was reported to be stolen. The period of five days is rather a long period for the prosecution to invoke the presumption under s. 114(a) of the Evidence Act 1950 as anything can happen to the said vehicle within the five days period. As stated earlier, the fact that the respondent claimed that he purchased the vehicle from one by the name of "Ah Wah" was never investigated, when this could have been done to ascertain the truth of the respondents claim.

[58] Mohamad Azmi J (as he then was) in the case of *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 LNS 116 has this to say with regard to this issue:

(1) The mere evidence of leading the police to spot, even if hidden, falls short of proving retention; there was no evidence of possession to raise the presumption under s. 114(a) of the Evidence Act 1950.

(2) Evidence that an accused person has pointed out object or places to police was of little value and was often prejudicial to the accused unless the information which led to the discovery was disclosed at the same time.

[59] Based on the above legal principles, and the facts narrated, I found that the presumption under s. 114(a) of the Evidence Act 1950 cannot be relied on by the prosecution.

[60] In the circumstances, I am unable to see that the decision made by the learned Magistrate to acquit and discharge the respondent on both the charges without calling for his defence was wrong as he had taken all relevant factors and weaknesses of the prosecution case before coming to his decision. For all these reasons I dismiss the appeal by the prosecution. The decision by the lower court is thereby affirmed.